

JUN 23 1979

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. **78 - 1907**

DENNIS GEORGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF ILLINOIS**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No.

DENNIS GEORGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF ILLINOIS**

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois entered on October 30, 1978,¹ affirming the Petitioner's conviction of the offense of solicitation of murder.

¹ A Petition for Leave to Appeal to the Supreme Court of Illinois was filed herein and denied; if such action by the Illinois Supreme Court is deemed an affirmance, then Petitioner would ask that the writ issue to the Supreme Court of Illinois and his Petition be so considered by this Court.

OPINION BELOW

Petitioner was found guilty of the offense of solicitation of murder in a jury trial held in the Circuit Court of DuPage County, Illinois and was sentenced to five years probation, the first six months to be served in the DuPage County Jail. Petitioner's conviction was affirmed by the Appellate Court of Illinois on October 30, 1978, in an Opinion published at 67 Ill. App. 3d 102, 384 N.E.2d 377, 23 Ill. Dec. 583 (See: Appendix A).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). Petitioner's conviction was affirmed by the Illinois Appellate Court on October 30, 1978. A Petition for Rehearing by that court was filed and denied on November 30, 1978 (See: Appendix B). Thereafter a Petition for Leave to Appeal was filed in the Supreme Court of Illinois and denied on March 29, 1979 (See: Appendix C); this Petition is timely filed within 90 days thereafter.

QUESTION PRESENTED FOR REVIEW

Whether the Appellate Court of Illinois, and the Supreme Court of Illinois by denying Petitioner's Petition for Leave to Appeal, failed to vindicate petitioner's right to a fair trial and due process of law by permitting the prosecutor to attack as uncorroborated, the defendant's account of a conversation with one Gordon Schiavone when he, the prosecutor, himself had caused such corroborative evidence to be excluded.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States:

No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Dennis George was, in September of 1975, the chairman of Young Republican Organization of Elmhurst, Illinois. At that time, a person named Gregg Thoele was also active in Young Republican activities; a young woman named Cynthia Runge was, then, his girlfriend. The petitioner was charged with having solicited the murder of Cynthia Runge by offering to pay one Michael Dunaway to find someone to commit the murder. Dunaway and George had been acquainted for about a year prior to the alleged solicitation, during which time Dunaway had demonstrated eccentric behavior and had claimed to have had criminal connections (C 532-535, 856-860)²—at one point he had threatened the life of Dennis George himself (C 856-860).

The prosecution was based on two conversations between the petitioner and Dunaway, one on September 12 and the other on September 19, 1975. Both these conversations took place in the family home of petitioner and, on both occasions, Dunaway was wired with electronic transmittal equipment; the conversations were monitored and tape-recorded by officers of the Elmhurst Police Department, who waited outside the George home. These tape recordings were admitted at petitioner's trial as People's Exhibit 1 and 2 (C 731-768).

Petitioner's theory of defense was that he had been approached by Dunaway who offered to arrange a killing to prove his political loyalty (C 863-865), and had par-

² "(C)" refers to the page number of the Record on Appeal in the State Court proceedings.

ticipated in the conversations only to see if he was serious in his suggestion, or merely proceeding upon the course of wild exaggeration which had characterized Michael Dunaway since the two had first met (C 868-869). Petitioner testified that he never intended that any crime be committed, never believed that Dunaway actually possessed criminal connections he claimed to have, and never expected that any harm would come to Cynthia Runge.

Solicitation is a specific intent crime in Illinois, requiring that the solicitor intend that the crime be committed.³ The only question with which the jury was presented, since the conversations were not denied by the defendant, was his state of mind—his intent. This question was not easily determined by the jury, which, after retiring to its deliberations, sent numerous requests to the court for additional information (C 1051-1061). Finally, the jury was brought back into court, where the forelady announced that it was stalemated (C 1068-1069). The two tape recorded conversations were then replayed for the jury over defense objection, and later a verdict of guilty was returned.

Central to the petitioner's defense was evidence of his acts and conduct inconsistent with actually intending that a crime be committed. Chief among these was a conversation petitioner had on September 12, 1975, with a friend of his, Gordon Schiavone. Schiavone had arrived at petitioner's house just as his conversation with Dunaway was concluding. Petitioner was permitted to

³ The Statute under which the petitioner was charged, Illinois Revised Statutes, 1967, Ch. 38, § 8-1(a), reads:

A person commits solicitation when, with an intent that an offense be committed, he commands, encourages or requests another to commit that offense.

testify to this conversation in which he had told Schiavone that Dunaway had approached him with a plan to "kill Gregg's girlfriend," and that he was endeavoring to find out whether he was actually serious about it (C 890-891). Additionally, Schiavone was called to corroborate the conversation, but the State interposed a hearsay objection. The defense argued the applicability of numerous exceptions to the hearsay rule recognized in Illinois, but the objection was sustained (C 812-817), and Schiavone was not permitted to testify on this point.

In the State's rebuttal argument, the prosecutor, after commenting on the defendant's testimony as to his conversation of September 12 with Schiavone, argued to the jury the inference that there was in fact no such conversation because it had not been corroborated by Schiavone when he testified.⁴ Objection to this argument was overruled to the end that the prosecutor was permitted to argue to the jury the unbelievability of the petitioner's testimony because of the absence of corroborative evidence, an absence which he, by artful objection, had himself procured.

⁴ The exact language of the argument is as follows (C 1036-1037):

Mr. Kowalczyk: It is not important what the ages of anybody are.

You heard Dennis testify to his side of the conversation with Gordon Schiavone.

You didn't hear Gordon Schiavone testify to his side of the conversation.

Although throughout the course of this trial you have heard the State mention names of cases and say that this is the procedure you follow, why didn't defense ask Gordon Schiavone what he said?

You all know he could have done that.

He didn't do that.

Mr. Berkos: I am going to object to that.

The Court: Proceed.

REASONS FOR GRANTING THE WRIT

The petitioner believes, as a prologue to consideration of the issue he here raises, that two undisputable facts must be borne in mind. First, it must be remembered, that the only genuine question which the trial presented for determination was his intent, his state of mind, at the time he had the conversation with Michael Dunaway. Consequently, any evidence or inference which supported or undermined his testimony as to his mental state was necessarily of the utmost importance. Next, it must be noted that, although intent was the only issue, this was a close case: the jury had sent to the trial judge, Alfred Woodward, numerous requests for additional information, it had announced that it was stalemated, and finally, it was able to reach a verdict only after it reheard the entire tape recorded conversations—more than an hour of evidence. Against this backdrop, the prejudicial effect of the prosecutor's misleading argument becomes apparent.

The issue raised in this Petition was dealt with in the following way by the Appellate Court of Illinois:

Defendant further contends, however, he was unfairly prejudiced by the State's argument to the jury in which the prosecutor pointed out that although the defendant had testified to his side of the September 12 conversation with Schiavone, that Schiavone did not testify to it, thereby inferring Schiavone would have disagreed with the defendant's testimony. We agree that the argument was improper and should not have been made. It is apparent Schiavone failed to testify to that conversation only because the State's objection prevented him from doing so. We do not believe, nevertheless, that the improper argument was a material factor

in the defendant's conviction. The jury was equally aware that the State had objected to Schiavone's testimony and by that action had prevented the witness from further inquiry into the conversation in question. It is unlikely the jury would give credence to the argument suggested by the State. (Appellate Court Opinion, p. 6a)

The petitioner submits that the prosecutor's conduct, even as understood by the Appellate Court's decision, clearly violated his right to a fair trial and due process of law.

It has long been recognized that due process of law requires that a prosecutor not conceal nor misrepresent the truth to either the defendant or the trier of fact. *Mooney v. Holohan* (1935) 294 U.S. 103; *Napue v. Illinois* (1959) 360 U.S. 264; *Alcorta v. Texas* (1957) 355 U.S. 28; *Miller v. Pate* (1967) 368 U.S. 1. In *Giglio v. United States* (1972) 405 U.S. 150, this Court interpreted the rule in *Napue v. Illinois*, supra, to extend even to inadvertent nondisclosure of facts favorable to defendant, so long as such were material to the conviction. In the case at bar, the prosecutor's misstatement was addressed to the most crucial point in the case, the defendant's intent. The prosecutor's intentional misrepresentation as to the character of Schiavone's unreceived testimony struck at the very heart of the petitioner's defense. Clearly, the discussion with Schiavone regarding the conversation with Dunaway is all but conclusive that the petitioner did not actually intend that any crime be committed. The prosecutor's misleading inference, that had there been such a discussion it would have been corroborated by Schiavone, effectively and dishonestly destroyed one of the facts most favorable to the petitioner upon the issue of intent, a question inherently difficult of proof to begin with.

While this Court has reviewed the question of the prosecutor's misstatements in numerous other decisions, the case at bar differs from those prior cases in one regard: in those cases, the misrepresentation took the form of evidence sponsored by the prosecution, and not a misrepresentation advanced exclusively in argument. The petitioner is aware of no case in which misrepresentation during argument alone has been considered by this Court, but submits that the reason for this is not because such a misrepresentation is less offensive to due process than false evidence, but rather because there is, thankfully, a paucity of cases in which trial courts are willing to suffer, and reviewing courts to countenance, a prosecutor's lying to the jury about the character of defense evidence which he has caused to be excluded. The petitioner maintains, however, that the vice of this conduct rests in the fact of intentional misrepresentation, and that nothing in law nor logic indicates that due process is any less offended by a prosecutor's intentional, and material misrepresentation made in argument than anywhere else in the proceeding. Petitioner is aware of one case, from his own jurisdiction, having similar facts but reaching an opposite conclusion. A different District of the Appellate Court of Illinois⁵ was confronted with similar facts in *People v. Faulkner* (1972) 7 Ill. App. 3d 221, 287 N.E.2d 243, a case in which the prosecutor had successfully excluded a defendant's exhibit which corroborated his testimony, and then, in final argument, attacked his credibility by pointing out to the jury the

⁵ The Appellate Court of Illinois is divided into five Judicial Districts, which sit in different locations throughout the State, each with its own bench of Justices. The case at bar was decided by the Second Judicial District sitting in Elgin, Illinois. *People v. Faulkner* was decided by the First Judicial District sitting in Chicago.

absence of corroboration. There the court relied on *Napue v. Illinois* in holding that the Fourteenth Amendment had been violated, and reversed the conviction, saying (*People v. Faulkner*, supra, at 245):

It was particularly unjust for him to chide the defendant for not producing the Warden as a witness when his own action prevented the jury from seeing the Warden certification of King's discharge.

The petitioner submits that such a misleading comment on the failure of the defendant to produce evidence is no different from any other untruthful or misleading action by the prosecution, except that in such case the trial court, necessarily aware of the true state of the facts, would be expected to immediately correct it. But where it does not do so, as in the case at bar, a defendant's right to a fair trial is as fully compromised as in the cases involving the use of false testimony which this Court has considered. In such cases, reversal is required by justice and commanded by the decisions of this Court.

In the case at bar, the same conclusion was mandated as that of *People v. Faulkner*, supra, but not reached. Here, while recognizing that the prosecutor's argument was "improper" the Appellate Court of Illinois declared that the argument was harmless under a theory that the jury could not have believed it. The petitioner submits that such a declaration is inconsistent with this Court's decision in *Napue v. Illinois*, supra, and violative of the due process requirement of the Fourteenth Amendment. *Napue v. Illinois* posed for this Court a similar question of whether the prosecutor's misconduct was a material fact in gaining the conviction. The Supreme Court of Illinois had viewed the error, the prosecutor's failure to correct false evidence of a promise made to the witness

Hamer, as harmless because the jury was apprised of the true facts by other testimony—Hamer had also stated that a public defender was "going to do what he could" for him [*Napue*, supra, at 268]. This Court rightly observed that the fact that the jury may have been apprised of this matter on other grounds did not turn "what was an otherwise tainted trial into a fair one." [*Napue v. Illinois*, supra, at p. 270] But the facts in the case at bar are even more aggravated than those in *Napue v. Illinois*. Here, there is really no rational basis to suppose that the making of the objection, which was argued and ruled on in chambers (C 812), indicated to the jury anything about the character of the unheard evidence. This is particularly true since the jury was instructed in this case, as in all criminal proceedings in Illinois, to take no notice of the objections of counsel.

This Court held in *Napue v. Illinois*, supra, and elsewhere, that it is not bound by a lower court's conclusions, but has both the right and the duty to reexamine the evidentiary basis on which those conclusions rest. The petitioner submits that the prosecutor's misrepresentation here bore directly on the jury's determination of the merits of his defense, and must have, in so close a case, contributed to the verdict. He was denied his right to a fair trial by this misconduct of the prosecutor.

CONCLUSION

For the reasons urged heretofore, and because of the importance of the constitutional question raised, and because there is not yet an expression from this Court specifically discountenancing untruthful and misleading arguments, it is respectfully requested that a writ of certiorari issue for review and reverse the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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APPENDIX A

OPINION OF THE APPELLATE COURT

MR. JUSTICE NASH delivered the opinion of the court:

Defendant, Dennis George, was convicted of solicitation to commit murder (Ill. Rev. Stat. 1973, ch. 38, par. 8-1) after trial by jury and was sentenced to five years probation, the first six months to be served in the DuPage County jail. He appeals, contending: (1) the indictment was invalid; (2) the trial court erred in denying his motion to suppress tape recordings of conversations between himself and a witness; (3) prejudicial error in the admission and exclusion of evidence and improper argument by the State requires a new trial; and (4) the evidence was insufficient to establish his guilt beyond a reasonable doubt.

Defendant, a 19-year-old college student who was active in political organizations in DuPage County, was charged with soliciting one Michael Dunaway to "arrange for" the murder of Cindy Runge, the girlfriend of defendant's friend and political ally, Greg Thoele. The defendant had met Dunaway in the spring of 1975 when Dunaway suggested to defendant he could be useful to defendant's future political career by protecting him and by providing him with damaging information about his political adversaries. This offered assistance was apparently rejected by defendant but he and Dunaway remained in occasional contact. They had a disagreement in April or May of 1975 at which time Dunaway approached the Elmhurst police and told them he had been requested by defendant to murder Cindy Runge

and offered his assistance in securing evidence of that solicitation for the officers. The officers then obtained permission from a DuPage County Assistant State's Attorney to record a meeting planned for September 12 between Dunaway and the defendant; Dunaway was outfitted with a concealed transmitter and the police recorded a conversation between these men in defendant's home on that day. On September 19 a second conversation was transmitted and recorded by the officers in the same way, again after authorization by an Assistant State's Attorney. On that same day officers observed defendant and Dunaway leave defendant's home and travel to a store where defendant cashed a check and gave money to Dunaway. He had been searched prior to this meeting and returned to the officers with funds which he testified in trial were given to him by defendant as a downpayment for the murder.

The taped recordings of these two conversations, which were played for the jury during the presentation of the State's case and again at the jury's request during its deliberations, together with Dunaway's testimony relating to the same matters, constituted essentially all of the inculpatory evidence presented against defendant. In the conversation recorded on September 12, Dunaway told defendant he had arranged for Cindy Runge to be "bumped like you wanted" and defendant asked what it would cost, who would do it and how he would be protected from being implicated. Dunaway told him the "hit" would take place in two weeks and that the victim would be shot. Defendant then asked Dunaway when he wanted the \$500 and Dunaway said he wanted it the day after the hit. On September 19th, during the second taped conversation, Dunaway asked defendant why he had called after three months and asked him to arrange a hit and defendant replied that Dunaway was the only

person he knew who would do that type of thing. Dunaway then told defendant he needed a picture of the victim and \$50 as a "show of faith" for the people who were actually going to do the job and defendant mentioned he was concerned about how it would be done and did not want Greg Thoele with the victim when it happened. When asked by Dunaway why he wanted this done defendant said, "[t]here is no other way to keep him active in politics. * * * I worked it out in my mind and there is no other way." When Dunaway remarked to defendant it was strange he had called to ask him to "do a hit" when they hadn't seen each other in three months, the defendant replied: "Didn't I say I'd call you this way one day[?]"

In trial defendant testified that Dunaway had in fact called and told him that Dunaway was going to kill either Thoele or his girlfriend in order to prove his loyalty to defendant. He testified he only went along with Dunaway in their conversations in order to determine whether or not he was serious, that he never intended that Cindy Runge be killed and that the money he gave Dunaway was actually for a loan. He further testified that he did not believe Dunaway had the underworld connections he claimed and that shortly after the first taped conversation he had told a friend, Gordon Schiavone, about it and had told him he thought Dunaway was not serious. Defendant also testified that he had contacted a detective agency between September 12 and 19 to determine if they could "bug" his room but was informed it would be illegal.

Ten character witnesses testified that defendant had an excellent reputation in the community for being a peaceful and law-abiding person but, after the State objected, were not permitted to give further opinions relating to his reputation for truth and veracity.

Defendant first contends the indictment was invalid as it simply charged that he "requested Michael Dunaway to arrange for" the commission of murder whereas section 8-1(a) of the Criminal Code states: "[a] person commits solicitation when, with intent that an offense be committed, he *commands, encourages or requests* another to commit that offense." (Ill. Rev. Stat. 1973, ch. 38, par. 8-1(a) (emphasis added) .) The test of the sufficiency of an indictment is whether it contains the elements of the offense intended to be charged, sufficiently apprises defendant of that offense to enable him to prepare a defense and would sufficiently identify that offense so as to sustain a plea of acquittal or conviction in bar of any further prosecutions for the same offense. (*People v. Norris* (1975), 28 Ill. App. 3d 590, 328 N.E.2d 577; *People v. Harvey* (1973), 53 Ill. 2d 585, 294 N.E.2d 269.) While it is apparent this indictment was inartfully drawn, we do not agree that it is fatally defective. Its language contains all of the elements of the offense of solicitation and describes the offense charged in a manner sufficient to enable defendant to prepare his defense and to identify it for use in any future plea in bar.

Defendant contends next the trial court erred in denying his motion to suppress the two tape recordings and in admitting them in evidence in trial. Section 14-2(a) of our Criminal Code (Ill. Rev. Stat. 1973, ch. 38, par. 14-2(a)), during the time in question, prohibited the use of an eavesdropping device to hear or record a conversation except with the consent of both parties to the conversation or with the consent of one party and at the request of the State's Attorney. Defendant argues that the authorization of an Assistant State's Attorney does not meet the requirement of this provision; however, this court has held that the authorization of an

Assistant State's Attorney does satisfy the statute. (*People v. Holliman* (1974), 22 Ill. App. 3d 95, 316 N.E.2d 812.) He further contends the trial court's determination that Dunaway validly consented to the use of an eavesdropping device during his conversation with defendant was against the manifest weight of the evidence. Defendant refers to Dunaway's age of 17 years and the fact he then had been charged with burglary in another county, suggesting he was coerced into assisting the investigating officers. The evidence also disclosed, however, that it was Dunaway who first approached the Elmhurst Police Department concerning the defendant and that he had executed a written consent form authorizing the recording of his conversation with defendant. In his testimony in trial Dunaway did not suggest he had been compelled to so assist the officers and defendant did not at that time make inquiry of him in that regard. The finding of the trial court that the requirements of the eavesdropping statute had been met was fully supported by the evidence in this case.

He further contends the admission of the September 19th tape recording in evidence was error because the recording equipment had been turned off by the monitoring officers when Dunaway and defendant left defendant's house, thereby keeping from the jury a portion of their conversation and depriving defendant of a fair trial. Officer O'Connell testified he had turned the tape recording machine off at that time because the parties were riding in an automobile and its engine prevented the transmitter carried by Dunaway from operating. In fact, nothing could have been recorded during most of that period. Both defendant and Dunaway testified in trial to all of their conversations, whether recorded or otherwise, and defendant was not prejudiced by the circumstance to which he refers.

Defendant next contends the trial court erred in precluding Gordon Schiavone, whom he called as a witness, from testifying to a conversation Schiavone had with defendant shortly after Dunaway left defendant's home on September 12. Defendant contends, alternately, that the conversation was an admissible exception to the hearsay rule as a spontaneous declaration or that it was not hearsay at all because it was a declaration of intent not offered by defendant to prove the truth of the matter asserted by the witness in relating defendant's conversation with him on that occasion. Defendant, however, made no offer of proof regarding Schiavone's testimony and did not apprise the trial judge of the expected content of the witness' out of court conversation with defendant. In our view the trial court correctly determined the conversation was not admissible as a spontaneous declaration (see *People v. Poland* (1961), 22 Ill. 2d 175, 174 N.E.2d 804) and, not having been informed that Schiavone was expected to testify regarding defendant's intent or mental state at the time of the offense charged, the trial court had no basis for permitting the testimony to be admitted in evidence and correctly sustained the State's objection. See *People v. Rosa* (1977), 49 Ill. App. 3d 608, 613-14, 364 N.E.2d 389, 392.

Defendant further contends, however, he was unfairly prejudiced by the State's argument to the jury in which the prosecutor pointed out that although the defendant had testified to his side of the September 12th conversation with Schiavone, that Schiavone did not testify to it, thereby inferring Schiavone would have disagreed with defendant's testimony. We agree that the argument was improper and should not have been made. It is apparent Schiavone failed to testify to that

conversation only because the State's objection prevented him from doing so. We do not believe, nevertheless, that the improper argument was a material factor in defendant's conviction. The jury was equally aware that the State had objected to Schiavone's testimony and by that action had prevented the witness from further inquiry into the conversation in question. It is unlikely the jury would give credence to the argument suggested by the State.

Defendant next contendds the trial court erred in precluding his character witnesses from expressing their opinions of his reputation in the community for truth and veracity. Evidence of a good reputation for truth and veracity of a witness who has testified, as did defendant herein, is not made admissible simply because the witness has testified in the trial. It is only after his credibility has been placed in issue that the introduction of supporting reputation evidence is warranted. For example, such evidence would be admissible where the opposing party has produced evidence the witness had a bad reputation for truth and veracity, impeached him by evidence of a previous conviction or attacked his testimonial veracity in cross-examination; mere contradiction of the witness' testimony, however, is not sufficient to allow the introduction of supportive reputation testimony. (*Tedens v. Schumers* (1884), 112 Ill. 263; *People v. Griffith* (1978), 56 Ill. App. 3d 747, 756, 372 N.E.2d 404, 411; see Mauet, *Reputation Evidence in Criminal Trials*, 58 Chi B. Rec. 72 (1976); see also *People v. Weathers* (1974), 23 Ill. App. 3d 907, 320 N.E.2d 442.) As defendant's veracity had not been first attacked, the exclusion of testimony regarding defendant's reputation for truth and veracity was not erroneous.

Defendant also contends the trial court erred in allowing the jury to hear again the two tape recordings during its deliberation. The jury had informed the trial court it was stalemated but that there was a reasonable probability it could reach a verdict if it were permitted to again listen to the tape recordings of Dunaway's conversation with defendant. The trial court stated that in that circumstance it would exercise its discretion and allow the tapes to be replayed as requested as they were somewhat unclear in parts and difficult to understand. We do not find the trial court abused its discretion in this regard.

Defendant contends finally that the evidence was insufficient to establish his guilt beyond a reasonable doubt. The determination of a jury will not be set aside unless the evidence upon which it arrived at its verdict is so improbable, unreasonable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt (*People v. Tate* (1976), 63 Ill. 2d 105, 345 N.E.2d 480) and we do not find that to be the case here.

For the reasons we have discussed the judgment of the Circuit Court of DuPage County will be affirmed.

Affirmed.

SEIDENFELD, P.J. and GUILD, J. concur.

APPENDIX B

(Letterhead Of)

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
ELGIN, ILLINOIS 60120

November 30, 1978

THE COURT HAS THIS DAY ENTERED THE
FOLLOWING ORDER IN THE CASE OF:

Gen. No. 77-113

People of the State of Illinois, appellee, v. Dennis W.
George, appellant,

The Petition for Rehearing filed by defendant, Dennis
George is denied.

/s/ LOREN J. STROTZ, Clerk

APPENDIX C

(Letterhead Of)

ILLINOIS SUPREME COURT
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March 29, 1979

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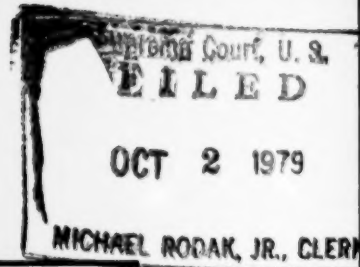
No. 51544—People State of Illinois, respondent, vs.
Dennis George, petitioner. Leave to appeal,
Appellate Court, Second District.

The Supreme Court today denied the petition for leave
to appeal in the above entitled cause.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court

No. 78-1907



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

DENNIS GEORGE,

Petitioner,

vs.

**PEOPLE OF THE STATE OF
ILLINOIS,**

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT**

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No. 78-1907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DENNIS GEORGE,

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vs.

PEOPLE OF THE STATE OF
ILLINOIS,*Respondent.*BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT

The respondent, People of the State of Illinois, respectfully prays that a Writ of Certiorari to review the judgment and opinion of the Appellate Court of Illinois, Second Judicial District, entered in this proceeding on October 30, 1978, be denied.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, respondent submits that petitioner has failed to show any reason for this Court to exercise its discretion to grant this Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether the Appellate Court of Illinois properly found that the prosecutor's final argument did not prejudice the petitioner's right to a fair trial, where the jury was fully aware that the state had objected to Schiavone's testimony, the jury was properly instructed that arguments of counsel were not to be considered as evidence, and the prosecutor's argument did not penalize or burden any of petitioner's constitutional rights or privileges.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accurate and complete in most respects. However, respondent believes that additional facts, not mentioned by petitioner, were significant in the determination of the issues in this case.

First of all, the prosecutor objected in open court to the admission of Gordon Schiavone's testimony concerning his alleged conversation with petitioner. (Tr. 812)¹ The prosecutor's objection was within the presence and full hearing of the jury, and thus the jury was fully aware that Schiavone's testimony had been excluded because of the prosecutor's objection.

Petitioner himself testified that Dunaway had initially offered to kill Cynthia Runge for the petitioner during a telephone conversation with petitioner on September 12, 1975, and that petitioner then invited Dunaway to his home to discuss the matter. (Tr. 868-869) It was after this meeting that petitioner allegedly talked to Schiavone about Dunaway's statement. The petitioner thus had at least two hours to fabricate his statement before speaking to Schiavone, and for this reason Schiavone's testimony was held to be inadmissible hearsay, since it was not within the "spontaneous utterance" exception. (Tr. 812-817)

¹ "Tr." refers to the trial transcript in the state court proceedings.

In commenting upon the petitioner's alleged conversation with Schiavone, defense counsel stated during his final argument to the jury:

"Now, if you are going to do that, then you are going to guesstimate on the testimony of Gordon Schiavone as to what his conversation was with Dennis.

Dennis was able to testify as to his side of the conversation, and they want you to guess what these words meant and draw a conclusion from that.

You can draw the same conclusion from what Dennis said and what you didn't hear from Gordon." (C. 1012)

During his final argument in summation, the prosecutor made the statement that petitioner now objects to:

"You heard Dennis testify to his side of the conversation with Gordon Schiavone.

You didn't hear Gordon Schiavone testify to his side of the conversation.

Although throughout the course of this trial you have heard the State mention names of cases and say that this is the procedure you follow, why didn't defense ask Gordon Schiavone what he said?

You all know he could have done that. He didn't do that." (C. 1037)

This argument by the prosecutor was given after the above-quoted argument by defense counsel, and was in response thereto.

Finally, the prosecutor admonished the jury during his opening argument that nothing he said was to be considered by them as evidence (Tr. 362), and immediately prior to the jury's retiring to deliberate the Court read to them the following instruction, as requested by the state:

Opening statements are made by the attorneys to acquaint you with the facts they expect to prove. Closing arguments are made by the attorneys to discuss the facts and circum-

stances in the case, and should be confined to the evidence and to reasonable inferences to be drawn therefrom. Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded. (C. 116)

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE APPELLATE COURT OF ILLINOIS PROPERLY FOUND THAT THE PROSECUTOR'S FINAL ARGUMENT DID NOT PREJUDICE THE PETITIONER'S RIGHT TO A FAIR TRIAL, WHERE THE JURY WAS FULLY AWARE THAT THE STATE HAD OBJECTED TO SCHIAVONE'S TESTIMONY, THE JURY WAS PROPERLY INSTRUCTED THAT ARGUMENTS OF COUNSEL WERE NOT TO BE CONSIDERED AS EVIDENCE, AND THE PROSECUTOR'S FINAL ARGUMENT DID NOT PENALIZE OR BURDEN ANY OF PETITIONER'S CONSTITUTIONAL RIGHTS OR PRIVILEGES.

The petitioner's sole argument in support of his request for *certiorari* to review the Illinois Appellate Court's decision below consists of a strained attempt at analogizing the facts of this case to those in *Napue v. Illinois*, 360 U.S. 264 (1959), wherein this Court held that a criminal defendant's Fourteenth Amendment right to due process is violated when his conviction is obtained through the use of false or perjured evidence, known to be such by representatives of the State. The facts of *Napue* find no parallel in this case, however. In *Napue* and its progeny (*Alcorta v. Texas*, 355 U.S. 28 (1957); *Miller v. Pate*, 368 U.S. 1 (1967); and *Giglio v. United States*, 405 U.S. 150 (1972)), it was the knowing and deliberate introduction by the state of perjured testimony that was held to be unconstitutional, not an erroneous, illogical or otherwise unfounded argument upon the testimony of the witnesses as heard by the jury. Petitioner does not contest the fact that Schiavone's testimony concerning his

alleged conversation with the petitioner was properly excluded from evidence, since it was hearsay not fitting within the "spontaneous utterance" exception; the exclusion of this testimony was not caused by any improper nondisclosure or deception practiced by the state, but by the fact that the testimony itself was inadmissible under the Illinois rules of evidence and could not have been considered as evidence by the jury.

The prosecutor's isolated statement, that the defense could have called Schiavone to testify about the conversation, was improper; the jury itself was aware that Schiavone's testimony had been ruled inadmissible upon the State's objection, because the objection had been made by the prosecutor within the jury's presence and hearing while Schiavone was on the witness stand. However, the gist of the prosecutor's statement—that petitioner's testimony concerning this conversation was uncorroborated—was entirely true and unexceptionable, since the petitioner did not and could not bring forward any relevant and admissible evidence in support of this conversation other than his own testimony. The *inference* that defense counsel could have obtained this corroboration was incorrect; the *fact* that petitioner's testimony was uncorroborated—and could not be corroborated—was undeniably true. *Napue* is distinguishable from this case because the fact that petitioner's testimony was uncorroborated stemmed not from any bad faith nondisclosure of corroborative evidence by the state, but from the fact that his testimony could not have been corroborated by any other evidence admissible under Illinois law.

Furthermore, the prosecutor's argument was invited by the misleading final argument of defense counsel. In his summation, petitioner's attorney asked the jury to make a "guesstimate" as to what Schiavone's testimony concerning this conversation would have been, and to draw a conclusion from what petitioner said and from "what you didn't hear from Gordon (Schiavone)". (Tr. 1012) In response, the prosecutor reminded the jury that they had heard petitioner's version of the

conversation, but not Schiavone's, clearly admonishing them to consider only the facts in evidence. It is well settled under both Illinois law (*People v. Vriner*, 74 Ill. 2d 329 (1978)) and federal law (*United States ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976)) that a defendant who opens the door to such a subject by misleading argument cannot object when the state advances its own argument in reply.

Petitioner's counsel has candidly admitted that he is aware of no case in which misrepresentation during argument alone has been considered by this Court. (Petitioner's Petition, p. 9) Indeed, it is a well-settled rule in this Court and the federal courts that the issue of improper final argument is a matter of state law alone, and is not of constitutional dimension. *Frank v. Mangum*, 237 U.S. 309 (1914); *Setser v. Welch*, 159 F.2d 703 (4th Cir. 1947). Research by your respondent has disclosed only two reported cases where a prosecutor's final argument alone was held to violate a defendant's constitutional rights, and in each case the argument was condemned for having imposed a penalty or burden upon the defendant's exercise of another constitutional right or privilege.

In *Griffin v. California*, 380 U.S. 609 (1965), the prosecutor stressed the defendant's failure to take the stand and testify in his own defense, and urged upon the jury the inference that such failure demonstrated the defendant's inability to deny his guilt. Holding such prosecutorial comment violative of the Fifth Amendment privilege against self incrimination, this Court deemed the statement "a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (380 U.S. at 614)

In *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3rd Cir. 1973), a prosecution for murder, the prosecutor argued that defendant's telephone call to his attorney, shortly after being involved in an altercation resulting in another man's death, raised an inference of his guilt. In holding that the

prosecutor's argument penalized the defendant for the exercise of his constitutional right to counsel, the court cited this Court's decision in *Griffin, supra*, and stated:

"The *Griffin* Court focused its inquiry upon whether the petitioner had been 'compelled . . . to be a witness against himself,' " U.S. Const. Amend. V, whereas in the present case, the relevant constitutional provision called into question is the Sixth Amendment right to counsel. For the purpose of the 'penalty' analysis, however, we perceive little, if any valid distinction between the privilege against self-incrimination and the right to counsel. It can be argued, with equal vigor and logical support, as to either the *Griffin* situation or the present case, that a prosecutor's comment seeking to raise in the jurors' minds an inference of guilt from the defendant's constitutionally protected conduct constitutes a 'penalty' on the free exercise of a constitutional right." (476 F.2d at 615)

As stated above, in the instant case there was no deliberate misrepresentation or suppression of fact by the prosecution, nor did the state's final argument impose a penalty or burden upon the petitioner's exercise of a constitutional right. The defect in the prosecutor's argument concerned a question of admissibility of evidence under Illinois law, and, according to the findings of the Illinois Appellate Court, the defect was fully apparent to the jury and could not have influenced their verdict.

A ruling such as that requested by petitioner, that would invalidate as a matter of constitutional law an otherwise well-founded criminal conviction based upon a prosecutor's spontaneous misstatement during final argument—a misstatement of local state law and of itself having no constitutional significance—would have a heavy negative impact upon the desired finality of judgments and would not aid in deterring deliberate misconduct on the part of the state. Nor would such a rule be susceptible of reasonably exact application, except in cases where the prosecutor's argument directly penalizes a recognized

constitutional right. It is the proper function of attorneys, both for the prosecution and for the defense, to argue all reasonable inferences arising from the evidence; the rule espoused by petitioner would require a finding of constitutional error if the prosecutor's argument were illogical, or not fairly supported by the facts, or founded upon an innocent misinterpretation of the facts. It is the proper function of the jury, however, to judge if the inferences propounded by counsel are valid and supported by the facts, based upon the jury's understanding of the evidence admitted. In the instant case, the jury heard all the relevant and admissible evidence concerning the petitioner's behavior and state of mind during his solicitation of Cynthia Runge's murder, and they were properly cautioned by the trial judge against treating statements of counsel as evidence. It is clear, therefore, that the prosecutor's isolated misstatement did not deny petitioner his right to a fair trial.

CONCLUSION

For the foregoing reasons, People of the State of Illinois, Respondent, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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